## "TRIAL BY JURY – IT'S NOT FAIR IF YOU'RE NOT THERE"\* Judge Jeffrey E. Froelich Montgomery County Common Pleas Court

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"Why should there not be a patient confidence in the ultimate justice of the people? Is there any better or equal hope in the world?"

## - Abraham Lincoln

The concept of a jury trial is rooted deep in history. Mythology has it that Ares was acquitted for the murder of Halirrothius, son of Poseidon, when the jury of twelve gods split six to six. Similarly, Aeschylus, who died in 456 B.C., tells the story in his play *Eumenides* of the founding of the jury by the patron goddess of wisdom, Pallas Athena, who may have been the world's first foreperson of a jury.

Although non-mythological juries existed prior to 1200, it was in 1215 that the Magna Carta formally provided that "no free man shall be taken or imprisoned or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him unless by the lawful judgment of his peers, or by the law of the land." The concept of a jury of your "peers" has never meant people that are exactly like you, but rather jurors representing a cross-section of your community that have the same rights and privileges as you – people of equal legal standing, which, in the United States, is each of us.

The right to trial by jury was specifically mentioned in King James I's Instructions for the Government of the Colony of Virginia in 1606 and trial by jury was introduced into the Massachusetts Bay Colony in 1628. George III appointed judges (as long as the verdicts favored the Crown) and often moved trials to distant locations. Our Declaration of Independence lists

one of the grievances against the king as his "depriving us, in many cases, of the benefits of Trial by Jury." John Adams referred to the jury as the "heart and lungs of liberty." Thomas Jefferson considered trial by jury as "the only anchor ever imagined by man, by which government can be held to the principles of its constitution."

Alexander Hamilton wrote in the Federalist Papers that "the friends and adversaries of the plan of the convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them, it consists of this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government."

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . .." Although the Bill of Rights is only applicable to the federal government, the Fourteenth Amendment's guarantee of due process to citizens of the States incorporates the right to a jury trial because it is "inherent in a system of ordered justice," is a "fundamental right, essential to a fair trial," is "basic to our system of jurisprudence," and is a "fundamental principle of liberty and justice which lies at the base of our civil and political institutions."

Similarly, the Constitution of the State of Ohio, in Article I, Section 10, provides the right to a "speedy public trial by an impartial trial of the county in which the offense is alleged to have been committed."

There are, of course, alternatives to the jury system. Trial by ordeal (e.g., holding

a hot iron), divine intervention (e.g., being thrown into water to see if you float or sink), trial by combat, and compurgation (parties would hire professional oath-takers) have been 'tried.' However, ever since its founding, our country has shown a reluctance to entrust power over the life, liberty, and property of our citizens to such arbitrary processes or even to one judge or group of judges.

The jury is, in essence, a mini-democracy. Just as we allow "common" citizens to vote and decide who should govern them, the jury system represents a political decision that one's fellow citizens are best qualified to make fundamental decisions of guilt, innocence, and fault, and serves as a check on caprice; it is, however, totally dependent on citizen participation.

Formerly in Ohio, the law provided that elected public officials, physicians, attorneys, cloistered members of religious organizations, dentists, and persons over 70 years of age were automatically exempt from jury service. Also exempted were certain volunteer firemen and officers and enlisted personnel of the Ohio National Guard during their service. The law has changed and there are no more automatic occupational or age exemptions.

Rather, the law provides that the Court shall not excuse a person who is drawn as a juror unless it is shown (1) that the juror is necessarily absent from the county and will not return in time to serve; (2) the interests of the public or of the juror will be materially injured by the juror's attendance; (3) the juror is physically unable to serve; (4) the juror's spouse or a near relative of the juror or the juror's spouse has recently died or is dangerously ill; (5) the juror has been called as a juror for trial in a court of record in the county within the same jury year; or (6) the juror is a cloistered member of a religious organization (or Amish). If a

summoned juror is 76 years of age or older, the juror may choose to be excused. The law does permit the Court to postpone or defer the whole or a part of the time of service of a juror to a later date in the same term or to a subsequent term of the court, and our court grants one deferral without asking any questions.

The Common Pleas Court summons over 36,000 Montgomery County residents for jury service every year. Jurors are on call for three days or one trial. Jurors are instructed to complete a questionnaire (which can be done online) and to contact the jury service voice mail after 7:00 p.m. on the weekday before they are scheduled to appear. The average trial is less than three days in length and jurors almost always know ahead of time whether they will have to appear and, if so, when. Fewer than 2,500 jurors and alternates are actually seated during the year.

The Court does everything possible to make jury service a meaningful experience with as little inconvenience as possible. While there is no law requiring an employer to pay an employee who is called for jury duty, there are laws that not only prohibit an employer from interfering with or even discouraging jury service, but make it contempt of court to penalize the employee in any fashion for his or her service. All jurors who appear receive \$10 and those who are selected receive \$20 per day. This is hardly adequate compensation, but that is not the purpose of jury service. Many civic duties are "inconvenient." The right to vote can also be a hassle when we have to leave work, stand in line, or dash through inclement weather. Likewise, the obligation to serve in the military or the possibility of being drafted in time of war is perhaps the ultimate "inconvenience" and yet one which is necessary to preserve all of our rights. And

I didn't even mention paying taxes.

So why is it that doctors, lawyers, psychologists, dentists, stockbrokers, accountants, and other professionals, are always requesting to be excused from jury service or, worse, just do not show up?

Every time jury notices go out, the Jury Commission receives numerous letters, e-mails, and calls from business professionals and their staff (yes, that includes law offices) requesting that they be excused. The letters indicate how they must be available 24 hours a day and seven days a week (apparently never taking a vacation, going to a seminar, or having a sick day), how important their work is, how their clients or patients rely upon them in the most important of their affairs, and how, while they understand the importance of jury service, that this is something they simply cannot do.

Unless we want juries made up entirely of the retired and the unemployed (who often are excellent jurors, but who should not make up the entire jury), the Court must be very stringent in adhering to the law which does not allow excuses by occupation. And remember, we will work with your schedule.

There is probably not a person (myself included) who has not read a media report of a jury verdict (or a non-jury decision for that matter) in a civil or criminal case and expressed utter bewilderment. The truth is, however, that many of these sound-bites are misleading and in the vast majority of cases, the jury system works.

The law has a concept called "estoppel" which means a person's own act or failure to act "closes his or her mouth" and precludes that person from complaining. In this

sense, a physician who does not appear for jury service is "estopped" from complaining about a verdict in a medical malpractice case, as is a business person about a verdict arising from a dispute involving the breakup of a partnership, just as anyone who begged off jury service would be estopped from complaining about how juries "let off" criminals or juries are "misled and fooled" by forensic advocacy (which, by the way, is simply not true).

All of the judges have had personal requests from people who have not wanted to serve, but who have been required to attend; without exception, at least in retrospect, every one of these citizens has indicated that it was a meaningful and worthwhile experience and that they simply, as professionals and as citizens, felt good about doing the right thing in the particular case and in their decision to appear and serve as a juror.

If you need your service deferred or postponed or only can serve for specific days out of the time period for which you are called, simply let the Court know (letter, phone, e-mail) that and we will do everything possible to work with your schedule. I am not singling out any one profession, and we all understand the importance of every working person to the community and the financial strain jury service can impose. At the same time, we urge you to appreciate the importance of jury service to the particular parties and interests in a case, to our community, and to our system of justice, and to respond to the call for service. The jury system is not perfect, but it is the best and certainly most democratic method of justice ever designed -- but it's not fair if you're not there.

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*I claim no originality in this article; it is impossible to improve on the thoughts of others on this subject over hundreds of years.
(right.to.jury.wpd)